DALHOUSIE UNIVERSITY
MARINE & ENVIRONMENTAL LAW INSTITUTE

REPORT OF THE FIRST CANADIAN-JAPANESE SCHOLARLY EXCHANGE ON THE LAW OF THE SEA

Marine & Environmental Law Institute
Schulich School of Law, Dalhousie University
Halifax, Nova Scotia Canada
December 6-7, 2019

Prepared by Olga Koubrak
December 16, 2019

Marine & Environmental Law Institute, Schulich School of Law, Dalhousie University
Weldon Law Building, 6061 University Avenue, P.O. Box 15000, Halifax, Nova Scotia B3H 4R2
Tel: +1 902.494.1007 • Fax: +1 902.494.1316 • Email: aldo.chircop@dal.ca • Website: www.dal.ca/law/melaw

INTRODUCTION

On December 6-7, 2019, the Marine and Environmental Law Institute (MELAW) at Dalhousie University hosted the first Canadian-Japanese Scholarly Exchange on the Law of the Sea. The meeting was possible through the generous support of the Ministry of Foreign Affairs of Japan. The participants were invited leading experts in the Law of the Sea from across Canada and Japan (Annex). The goals of the exchange were to explore common interests, share perspectives as well as build partnerships on institutional and individual levels. The timing of the event coincided with the 25th anniversary of the entry into force of the United Nations Convention on the Law of the Sea (UNCLOS).

The meeting was organized into six sessions. The first five sessions consisted of three presentations on broad thematic issues at global and regional levels followed by discussions on the basis of the Chatham House Rule. The last session followed a panel discussion format with a particular emphasis on the East Asian Seas.

SESSION 1 - MARITIME BOUNDARY DELIMITATION AND JURISDICTIONAL LIMITS

The first presentation titled "Maritime Boundary Delimitation: Past, Present and Future of 'Useful' Litigation" discussed the role of litigation in the development of maritime boundary delimitation law. With 24 litigated maritime boundary disputes the third party settlement is an important tool of dispute resolution. The presentation reviewed the presumption of equidistance arising from Article 6 of the 1958 Convention on Continental Shelf as well as the concept of equitable principles that was originally based on coastal geography. Cases were used to illustrate uncertainties in weighing relevant factors and equity that arose as a result. The second part of the presentation looked at the potential areas of concern that arise from compulsory third party settlement under UNCLOS. These include "ambitious" arbitral tribunals, potential fragmentation, and forum shopping. The South China Sea arbitration was used to illustrate these points. Examples included the tribunal's questionable interpretation of the Convention, precedents and expert evidence in order to maintain jurisdiction, and adoption of an unprecedented strict definition of "island" contrary to state practice.

The second presentation was "The Plausibility Requirement in the Obligation of Self-Restraint under Articles 74(3) and 83(3) of the UNCLOS." Two cases figured prominently in the discussion: Guyana and Suriname and Ghana and Cote d'Ivoire. In these two cases, the judiciary concluded that there is a difference between the obligation of restraint and provisional measures despite their similarities in purpose. The plausibility test has to be satisfied as part of the obligation of self-restraint before provisional measures can be provided by the court or tribunal. The application of the plausibility test has significant implications for the management of the Japan-China disputes in the East China Sea, especially if oil discoveries are made.

The last presentation, "The Continental Shelf Beyond 200 M and Bilateral Boundary Delimitation", focused on the issue of potential overlap between an extended continental shelf claim and another state's EEZ. To date, delimitation cases that dealt with extended continental shelves have involved adjacent states. In those cases, courts/tribunals used the same methodology to establish boundaries within and outside the 200 M zone unless there were geographical (and not seafloor) differences that justified different treatments. A big question of uncertainty remains in cases of opposite states. In those cases, does the EEZ "trump" the continental shelf? The Colombia-Nicaragua dispute could be the first to tackle this issue. In the Arctic, multiple overlapping claims over the extended continental shelf remain outstanding.

Discussion points included:

- Trinidad and Tobago have a claim to an extended continental shelf that extends across EEZs of multiple states. States have exchanged diplomatic notes over the issue, and it remains to be seen if the case goes to court. This is different than the situation in the Gulf of Mexico where U.S., Mexico and Cuba have been very careful to avoid overlapping claims.
- It is unclear whether the Japan-Korea Joint Development Agreement qualifies as an interim agreement under UNCLOS. It was signed before UNCLOS came into force.
- The obligation to use every possible means to reach an agreement is closely related to the obligation of self-restraint and will impact its interpretation.
- There appears to be privileging of natural science over social sciences in the UNCLOS process. Courts and tribunals are reluctant to use social science evidence even when it is available. Historical fishing rights and other human uses are commonly raised during the negotiation process.
- Japan has outstanding delimitation as well as jurisdictional claims. It may be advisable for Japan to wait and see how the continental shelf vs EEZ disputes are resolved because that will affect Japan's position. At the same time, reaching delimitation agreements with Korea and China would resolve the uncertainty and take away the risk of an unfavourable decision. There are litigation strategies that can be used when dealing with sovereignty/delimitation cases. For instance, pursuing a two-phase arbitration.

SESSION 2 - BALANCING JURISDICTIONAL RIGHTS AND RESPONSIBILITIES IN MARITIME ZONES

The first presentation, "Judicial Balancing of Interests in the EEZ in the Jurisprudence of ITLOS and Annex VII Tribunals", explained that the EEZ can be seen as a zone of conflict or a zone of balance. Express balancing provisions such as due regard, powers compatible with, as may be necessary, are common under UNCLOS. A significant body of jurisprudence has developed around the interpretation of these provisions. But the judiciary

are also applying the reasonableness lens to interpret obligations under UNCLOS and impose limits on the powers of coastal states. Such cases include vessel seizures and enforcement actions by archipelagic states. The courts are also using the concept of due diligence as a standard against which to measure state conduct. The term due diligence is not mentioned in UNCLOS, however its usage could be supported by an integrated reading of the Convention. Questions remain about the standard of review and criteria used by the courts.

The second presentation was "Coastal States' Responsibilities in the Management of Transboundary Fisheries". For the purposes of this presentation, the definition of transboundary fish stocks was limited to stocks shared by coastal states. Article 63 of UNCLOS imposes an obligation on states sharing transboundary fish stock to cooperate in their management. Additional obligations exist under the 1995 UN Fish Stocks Agreement with Japan, Korea and Russia being parties. The presentation proceeded to discuss the Japanese fisheries legislation, namely the *1949 Fisheries Act* which was recently amended. More than half of fish stocks in Japan are depleted and it is unclear whether the amendments are enough to reverse this trend. The common fisheries right remains and it is protected as a property. Total allowable catch (TAC) was recently introduced as a management tool but only for eight species. The application of the precautionary approach is not very apparent in the new management system. Japan has bilateral agreements with neighboring countries that include reciprocal rights to fish in each other's EEZ. Enforcement powers are stipulated in these agreements. However, it is unclear who has enforcement powers with respect to third state vessels fishing in provisional zones. Three options were discussed to improve the status of stocks in the provisions zone. Option one includes a fishing moratorium. Option two calls for delimitation of the EEZ without resolving the sovereignty issues. And option three keeps the status quo but with enhanced cooperation on scientific data collection.

The third presentation of this session dealt with an emerging issue namely, "Marine Geoengineering and the EEZ". Geoengineering was defined as a deliberate large scale intervention in the world's climate system to offset climate change. The spectrum of potential geoengineering activities in the oceans is even broader and includes for example, growing algae for biofuels. There are two classes of geoengineering technologies. The first class deals with CO_2 removal and sequestration. The second class of technologies involves radiation management. These technologies, for the most part, do not yet exist and a lot of uncertainty remains around their feasibility, benefits and risks. Different UNCLOS obligations will be triggered depending on the technologies and their implementation. Interactions with other regimes such as biodiversity and human rights need to be considered as well. A high level review of geoengineering techniques has been completed, and international policy processes are underway. The 2013 Amendment to the London Protocol aims to regulate some geoengineering activities. However, the Protocol, as well as the amendment, have very few signatories. Given that there are economic incentives to conduct geoengineering activities, states are likely to pursue these activities in their EEZs. These technologies are controversial and raise ethical issues.

Discussion points included:

- 95 percent of Japanese fisheries are small coastal fisheries. Japan does not have an equivalent to the Aboriginal fishing rights in Canada.
- There is room under the 2013 Amendment to the London Protocol to decide if certain geoengineering technologies should not be developed. Canada and Japan are not signatories to the Amendment. Canada had a negative experience with ocean fertilization on the West coast. A lot of unanswered questions remain. For instance, how should the positive obligation to protect and preserve the marine environment feed into the cost-benefit analysis?
- Both ITLOS and Annex VII tribunals are taking a broad view of the term reasonableness. Legitimacy of this judicial interpretation should not be a problem as long as the judiciary articulates clearly the standard against which reasonableness is being measured.
- There may be fragmentation in the way different tribunals approach the question of jurisdiction. Both ITLOS and the Seabed Disputes Chamber are contemporary judicial bodies that are looking for a role. Their interpretation of jurisdiction may depend on how they view their roles.
- Due diligence is not the same construct as due regard. Due regard has procedural and good faith components while due diligence measures performance.

SESSION 3 - CLIMATE CHANGE AND THE ARCTIC ISSUES

The first presentation titled "Rising Seas and Retreating Coasts: Implications for the Arctic" provided the background of the changes that are taking place in the Arctic as a result of climate change. Changes such as rapid melting and thinning of sea ice as well as melting permafrost are resulting in significant coastal erosion. This means that UNCLOS baselines are shifting and thus impacting maritime boundaries and delimitations. The presentation proceeded to discuss the international response to this problem that is affecting not only the Arctic states but Pacific island states as well. One solution is to permanently "fix" all boundaries and maritime zones. Although this will mean that the international community will not have an opportunity to gain in the resulting increase in the high seas and international seabed area, this is an equitable solution for the states that are losing coastline.

The second presentation, "Northern Sea Route: Current Status and Future", explored the feasibility of commercial shipping along Russia's northern coast. It was noted that the use of the Northern Sea Route (NSR) goes as far back as 1878, whereas the official opening to international shipping took place in 1987. The opening coincided with Russia adopting domestic legislation regulating the NSR. Today, research shows that the use of the NSR is physically possible but concerns remain. For instance, weather forecasting and search and rescue capabilities need to be improved. Other factors that influence the use of NSR are cargo demand, political stability and regulations. Dry and liquid bulk carriers are

anticipated to dominate the NSR. Their volume is already increasing due to the increased exploitation of resources in the Russian north. Environmental concerns remain outstanding and are being discussed at the IMO, including a possible ban on the carrying for use and use of heavy fuel oil (HFO).

The third presentation was "Arctic Shipping in a Changing (Legal) Environment: A Look at Developments in Canada and at the IMO". It suggested that the shipping in the Canadian Arctic is likely to develop on a smaller scale than in the Russian Arctic. Precaution has been the regulatory guiding principle. For instance, the *Arctic Waters Pollution Prevention Act* (AWPPA) requires zero oil discharge in Canadian Arctic waters from domestic and foreign vessels. The IMO Polar Code is now binding in Canada, although its implementation has preserved aspects of pre-existing regulation of Arctic shipping. The extent of Canada's jurisdiction over Canadian Arctic waters remains unclear but to date, states using the Northwest Passage have complied with Canadian regulations. There are discussions at the IMO to strengthen the Polar Code, including extending the rules to non-SOLAS ships and restricting the use of heavy fuel oil. Canada is advocating for changes in ship design, equipment and restrictions on operations for non-SOLAS ships. Canada is also looking at the HFO issue while being mindful of the potential increased costs to the Arctic communities who may use HFOs for heating and transport. At the IMO the Arctic states are also considering a regional approach to port reception facilities for ship wastes to address the lack of infrastructure in the region.

Discussion points included:

- Outstanding questions remain around "fixing" the baselines and boundaries in response to eroding coastlines. For example, who will benefit from this solution? What about non-sea level rise changes to coastlines? These questions remain unanswered at this time.
- Marine insurance is currently available for NSR passages, and it is competitively priced. Russia may be introducing state-backed insurance as well.
- Container shipping across the NSR is not likely to be viable in the near future. It is not surprising that CMA/MSC, a major container shipping company, has announced that it is not going to be using the route and Maersk has not committed to it as well although they had a pilot transit.
- Chinese Arctic Policy is carefully drafted and does not say anything about the legal status of the NSR or the Northwest Passage.
- There are some divergent opinions between the Indigenous communities in the Arctic over the use of HFO. The ICC applied for a consultative status at IMO and is expected to advocate for a ban. There are some concerns that Canadian reticence over the proposed HFO ban is being influenced by the mining interests in the region.

SESSION 4 – THE INTERNATIONAL SEABED AREA AND SEABED MINING

The first presentation was "Legislation on Deep Sea Mining in Pacific Island States". It explained the types of deep seabed mining (DSM), namely manganese nodules, polymetallic sulphides and cobalt crusts. Pacific Island States, in particular Papua New Guinea and Cook Islands, are looking to benefit from seabed mining, the latter in particular with respect to the extraction of gold within its EEZ. This involves significant risks as demonstrated by the bankruptcy of Nautilus Minerals Inc. and the resulting $107M loss to the PNG government. There is also opposition to DSM from some quarters in the Region, with Fiji, for instance, advocating for a ten-year mining ban. A lot of uncertainty exists around the environmental impacts of DSM activities. Prospecting and scientific research is ongoing with SOPAC-Japan being one of the participants. China also is expanding its interest in the Region and could become the first country to start mining. The SPC-EU Deep Sea Minerals project is providing law-making support to the Pacific Island States, such as sponsoring states Nauru and Vanuatu, including provision of a template for mining legislation. However, there is a disconnect between these new mining laws and the existing environmental laws. Concerns are also raised over the regulatory capacity in the Region and states' abilities to enforce legislation thus ensuring adequate oversight of mining activities.

The second presentation was "The International Seabed Authority's and International Maritime Organization's Regulatory Competencies Related to 'Activities in the Area'". This presentation explored the areas of interface between the ISA and IMO mandates including maritime safety, environmental protection, security, training, and accommodation of other activities. A jigsaw puzzle of regulatory competencies emerged based on the provisions of UNCLOS, the Implementation Agreement, ISA regulations and IMO instruments. An MOU between the two organizations has been signed with respect to cooperation in areas of common concern. The question of the due diligence duty to exercise effective jurisdiction and control was also raised as it relates to the responsibilities of the sponsoring state and flag state. One of the potential solutions is requiring ships to be flagged under the sponsoring state's flag, but there are downsides to this proposal as well. Additional issues such as rules of reference in ISA regulations to the IMO instruments which might not cover cabotage and the ISA inability to request routeing measures from the IMO because it cannot be a party to SOLAS, were touched upon.

The last presentation in this session dealt with financial issues around DSM activities, and it was titled "Responsible Finance for Deep Seabed Mining: Market Mechanisms for Preventing and Mitigating Harm to the Global Commons". Best practices for a royalty regime in land mining were identified. These included effectiveness, equity, efficiency, simplicity and certainty, coherence and consistency, flexibility, and enforceability. The ISA royalty regime framework is based on these principles as well, but outstanding questions remain. Three models of royalty payments are being considered: value-based, profit-based, and hybrid. The presentation explained that DSM projects have an estimated 40-year lifespan and significant upfront costs. There are also many uncertainties around the nature of the DSM risks, making it difficult for the insurance industry to develop insurance products which are mandatory under the proposed regulatory scheme.

Discussion points included:

- Many areas in Oceania have been designated as UNESCO sites or are protected under the World Heritage Convention due to the number of sunken ships. UNCLOS provides for their protection under Article 149. This needs to be taken into account when discussing prospective DSM sites.
- The market is used to financing 25-30 year mining operations. DSM value is estimated to be $120 trillion. However, the estimate may be lower if full remediation cost is taken into account. Historical experience also cautions about the accuracy of resource development projections entailing environmental impacts.
- Submarine cables are proven money-makers. However, no one talks about their regulation and potential fees for using the Area. This was raised in the past but the cable industry firmly objected to the idea.
- The issue of interaction between deep sea fishing and activities in the Area, including the respective competencies of RFMOs and ISA, has been raised but no definitive answer has been given. Potential damage from DSM activities is unknown, and this makes it difficult to discuss compensation.
- Outstanding questions concerning the relationship between flag state and sponsoring state responsibilities have to be resolved. Issues around the use of international contractors and sub-contractors complicate matters further. Without adequate clarity around these issues there may not be effective DSM regulatory oversight and efficient enforcement jurisdiction by sponsoring states.

SESSION 5 - THE HUMAN DIMENSION AND THE LAW OF THE SEA

The first presentation titled "Child Rights and the Law of the Sea" noted that UNICEF named climate change as the number one threat to children's future. The presentation briefly reviewed key provisions of the Convention on the Rights of the Child, a widely ratified document. These included non-discrimination, best interest of the child, right to freely express their views and have them given consideration, procedural rights as well as rights to health, standard of living, education and culture. The presentation proceeded to discuss youth-led climate change litigation. Two cases were highlighted: *Sachi et al. v. Argentine et al.* brought before the UN Committee on the Rights of the Child and *La Rose et al. v. Her Majesty the Queen* brought before the Federal Court in Canada. In both cases youth argue violations of their rights due their countries' inaction on climate change. Both cases referenced ocean dimensions in their pleadings. Child advocacy was endorsed by the UN in the 2030 Agenda for Sustainable Development. Treaties on procedural environmental rights were mentioned. These were the Aarhus Convention which is open to all states and the Escazú Agreement that covers Latin America and the Caribbean.

The second presentation was "Women's Rights and the Law of the Sea". This presentation discussed initiatives aimed at helping women in the Arctic share their experiences. Data

are lacking on women's experiences in the north. The 2030 Agenda for Sustainable Development recommends gender equality to be mainstreamed across sectors. However, gender is not mentioned in UNCLOS. Furthermore, references to "mankind" and "humankind" do not preclude gender discrimination. The Finnish chairmanship of the Arctic Council brought with it an increased interest in gender equality. This interest has waned once the Finnish term was complete.

The third presentation, "Asylum Seekers and the Law of the Sea", opened with the grim statistics on the number of migrants who have died in the Mediterranean. The presentation noted that disembarkation is the nexus between the law of the sea and the law of the land and described strategies used by states to prevent migrants from disembarking. Examples included Frontex Operation Triton, Canada's Migrant Smuggling Prevention Strategy, and the EU Operation Sophia. Despite the existence of multiple obligations towards rescued persons, states are reading these obligations narrowly to prevent refugees from having an opportunity to make a claim. A non-binding Global Compact for Migration has been negotiated to address some of the human rights concerns. However, many of the key players have failed to sign this agreement.

Discussion points included:

- Women are rarely ever mentioned in the UNCLOS and maritime law instruments, with the exception of the Maritime Labour Convention.
- Since sources of international law include informed opinion, what are the implications if senior experts are all male?
- Cuban and Haitian refugee claimants are treated differently in the US because of geopolitics.
- States are reluctant to pursue clarifications of how UNCLOS obligations interact with other areas of law such as human rights and humanitarian law.
- The Global Compact on Migration anticipates the issue of climate change refugees from disappearing countries. There is a distinction between being without a territory and being stateless.
- Canada restricts immigration rights in situations where a government vessel approaches a flagless vessel.
- Child pirates account for one-third of piracy cases. Procedural safeguards afforded under the national criminal code raise practical difficulties when child pirates are apprehended at sea.
- Litigation may be one way for youths to have their voices heard before they are able to vote.

SESSION 6 - DISPUTE SETTLEMENT AND THE EAST ASIAN SEAS

As a panel, this last session consisted of introductory comments by panelists and exchanges of views among them, followed by a general discussion among all participants. The principal points of discussions included:

- Japan, China and Korea are UNCLOS parties, however China and Korea have excluded boundary disputes from the mandatory dispute settlement mechanisms of Part XV.
- In general, there appears to be preference in the region for non-confrontation means of resolving the disputes.
- It was observed that conciliation is rarely used as a mechanism to facilitate the resolution of disputes in the law of the sea. The Timor-Leste and Australia case was discussed as an example of a successful compulsory conciliation process. Some of the conditions for success in this case may not be present in other disputes. For example, there are political realities and public perception in Japan with respect to the disputed territories that have to be taken into account.
- Institutional composition could contribute to the public's perception of legitimacy of a decision.
- The region has managed its disputes relatively well. Many informal and formal arrangements are in place that prevent disputes from escalating as well as providing for the management of the disputed areas. For example, claims in the Japan-Korea strait do not appeared to be maximized. Also, there are transboundary arrangements such as the Joint Development Zone Agreement between Japan and Korea. The ideal end goal is effective management rather than adjudication.
- The use of Advisory Opinions from ITLOS and the Seabed Disputes Chamber appears to be helpful in clarifying the law.
- Confidence building between states takes time. Identifying areas where it is easier to build trust, including through technical forms of cooperation such as search and rescue is a good starting point. Trust also fluctuates and there are political considerations involved.
- Based on the result in the South China Sea arbitration, it is advisable to participate at least in the part of the case dealing with jurisdictional issues.

CONCLUSION: POTENTIAL FUTURE COLLABORATION

The meeting concluded with a general discussion exploring interest in pursuing future cooperation among participants and their institutions. The principal ideas discussed included:

- Convening a second exchange with a focus on ocean governance in the Asia-Pacific region. The themes that could be covered include: BBNJ; Arctic; rights of

children; climate refugees; principle of integration in UNCLOS; global commons and leadership in regime-building in these areas; and plastic pollution.

- Developing exchange agreements between Canadian and Japanese law schools to enhance student and faculty mobility.
- Co-developing an action-oriented research course for students with a focus on international law topics. This could be a laboratory-type course on UNCLOS.
- Exploring the feasibility of reciprocal virtual lectures/seminars by Canadian and Japanese faculty in their respective courses.
- Inviting Japanese scholars to submit papers for publication in the *Ocean Yearbook*. This should include inviting Japanese faculty to nominate papers for the *Ocean Yearbook*'s annual law of the sea prize for the best student paper.

The meeting achieved its goals and concluded by expressing appreciation to the organizers for convening the meeting and the Ministry of Foreign Affairs for the generous support provided.

ANNEX

LIST OF PARTICIPANTS

Japanese participants

Mr. Toru Hotta, Director, Law of the Sea Section, Ministry of Foreign Affairs
Professor Natsuhiko Otsuka, Arctic Research Centre, Hokkaido University
Professor Chie Kojima, Faculty of Law, Chuo University
Professor Makoto Seta, International College of Arts and Sciences, Yokohama City University
Professor Tomoko Kakee, Graduate School of International Development and Cooperation, Hiroshima University

Dalhousie participants

Professor Camille Cameron, Dean, Schulich School of Law, Dalhousie University
Dr. Anya Waite, Associate Vice-President Research (Ocean), Dalhousie University
Professor Phillip Saunders, Director, Marine & Environmental Law Institute, Dalhousie University
Professor Aldo Chircop, Canada Research Chair, Marine & Environmental Law Institute
Professor Constance MacIntosh, Viscount Bennett Professor of Law, Schulich School of Law, Dalhousie University
Professor Sara Seck, Associate Dean Research, Schulich School of Law, Dalhousie University
Tahnee Prior, Visiting PhD Candidate
Keith MacMaster, PhD Candidate, Schulich School of Law, Dalhousie University

Visiting Canadian participants

Professor Ted McDorman, Faculty of Law, University of Victoria
Professor Nigel Bankes, Faculty of Law, University of Calgary
Professor Kristin Bartenstein, Université Laval
Professor Anna-Maria Hubert, Faculty of Law, University of Calgary
Professor Suzanne Lalonde, Université de Montréal

MELAW Associates

Dr. Brian Flemming, QC
Wendell Sanford, retired, Global Affairs Canada
Dr. Galo Carrera, formerly with the Commission on the Limits of the Continental Shelf
Professor Hugh Williamson, Marine Affairs Program, Dalhousie University